42D CONGRESS, 2d Session. | SENATE. | REPORT No. 21.

IN THE SENATE OF THE UNITED STATES.

JANUARY 25, 1872.—Ordered to be printed.

Mr. CARPENTER, from the Committee on the Judiciary, submitted the following

REPORT:

The Committee on the Judiciary, to whom was referred the memorial of Elizabeth Cady Stanton, Isabella Beecher Hooker, Elizabeth S. Bladen, Olympia Brown, Susan B. Anthony, and Josephine J. Griffing, citizens of the United States, praying for the enactment of a law, during the present session of Congress, to assist and protect them in the exercise of their right, and the right of all women, to participate in the elective franchise, which the memorialists claim they are entitled to under the Constitution of the United States, together with various other petitions and memorials to the same effect, and various protests in opposition thereto, respectfully submit the following report:

By the Constitution of the United States, prior to the fourteenth and fifteenth amendments, the power to regulate suffrage, even in the election of President and Vice-President, Senators and Representatives in Congress, was possessed by the States composing the Union, so that Congress could make no affirmative provision concerning the same; nor could Congress alter or amend regulations made upon this subject by the respective States. Article I, section 2, provides as follows:

> The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Section 3 of the same article provides:

> The Senate of the United States shall be composed of two Senators from each State chosen by the legislature thereof for six years; and each Senator shall have one vote.

Article III, section 1, provides:

> Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.

From these provisions of the Constitution it is apparent that the States possessed the sole power of determining the qualifications of electors therein. And, so far as these provisions are concerned, it is manifest that each State had the power to make such discrimination as it pleased between its own citizens in regard to their participation in the elective franchise. Each State might admit all citizens, male and female, over a prescribed age, or only some classes of them, or might require a property qualification, which would, in effect, exclude all citizens not possessing the required amount of property. Each State might

discriminate in this particular between its citizens on account of race, color, servitude, or upon any other ground. And under this Constitution the several States established various and incongruous regulations upon this subject. In Massachusetts no distinction on account of color was recognized, while in other States all persons having even admixture of African blood, however slight, were excluded; and some States required a property qualification, while others did not.

There is, however, another provision of the Constitution which merits consideration in this connection. Article IV, section 4, provides:

> The United States shall guarantee to every State in this Union a republican form of government.

Under this provision it is insisted, with some plausibility, that a State government which denies the elective franchise to a majority of the citizens of such State is not "a republican form of government." But your committee are not satisfied that this proposition can be maintained. In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it. The Constitution, like a contract between private parties, must be read in the light of the circumstances which surrounded those who made it. The history of the colonies, the history of the Confederation, and the circumstances under which the Constitution itself was framed and adopted, must all be taken into account; and then we must ascertain by reading the whole instrument together the sense in which particular provisions and phrases were employed. If any State government which to-day excludes from suffrage a majority of its citizens is not in form a republican government, then a State government which did the same thing at the time the Constitution was adopted was not in form a republican government. The exclusion of all female citizens from the suffrage cannot impair the republican form of an existing State government, unless the same thing worked the same result upon the State governments in existence when the Constitution of the United States was adopted.

It was assumed on all hands that the governments of the thirteen States which framed and adopted the Constitution were in form republican; and this provision was intended to keep them so, and make it impossible for any State to change its government into a monarchy. The construction of this provision now contended for would have made it the duty of the Government of the Union, during the first year of its existence, to enter upon the reconstruction or remodeling the governments of the States by which the Union itself had been spoken into existence. In view of the history of those times, it cannot be maintained that the States or the people intended to confer such a power upon the Government of the Union; and no one can doubt that such an attempt on the part of the Union, in regard to the thirteen States, would have been condemned by the unanimous voice, and resisted by the united force of the people. If such a power did not then exist under the Constitution of the United States, it does not now exist under this provision of the Constitution, which has not been amended. A construction which should give the phrase "a republican form of government" a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular. This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument; and your committee are satisfied of the entire sound-

ness of this principle. A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution, either to enlarge or limit its provisions.

There is another provision of the Constitution which is generally referred to in this connection, but which, in the opinion of your committee, has no application to the subject. Article IV, section 2, provides:

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

It has been much discussed whether the right to vote and hold office in a State was within the privileges and immunities protected by the provision above quoted. But it is unnecessary to consider that question here, because, even if the right to vote and hold office be considered as embraced within this provision, still it was in the power of the State to which a citizen might remove to determine what class of citizens should or should not vote or hold office in such State; and the citizen removing to such State was only entitled to the privileges and immunities possessed by the class of citizens to which such removing citizen belonged under the Constitution and laws of the State to which he had removed.

We come now to consider the fourteenth and fifteenth amendments to the Constitution, under which, also, the right of female suffrage is claimed. The fourteenth amendment, so far as applicable to this subject, is as follows:

> All persons born and naturalized in the United States, &c., are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The second section of this amendment provides that—

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the *right to vote* at any election, &c., is denied to any of *the male inhabitants* being twenty-one years of age, &c., the basis of representation therein shall be reduced in the proportion which the number of such *male citizens* shall bear to the whole number of *male citizens* twenty-one years of age in such State.

It is evident from the second section of this amendment above quoted that the States are considered to possess the power of excluding a portion of their male citizens from the right to vote, upon grounds or reasons to be determined by themselves; because this section determines that, in case the State shall exercise this right so as to exclude citizens of the United States, except for commission of crime, the basis of representation for such State shall be correspondingly reduced.

It was argued before your committee by the memorialists—who, by a departure from the usual practice of the committee, were admitted to a public discussion of the principles involved in the memorial—that the right of every citizen, male or female, to vote was secured by that clause of the first section of the fourteenth amendment which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" and that the second section was designed to fix a penalty upon the State for a violation of the former provision.

But such a construction is at war with all the theories of constitutional government. An unconstitutional act is void. In other words, an unconstitutional act is no act. The legislature of a State may attempt to pass a law impairing the obligation of contracts; but, as the legislature *cannot* pass such an act, the attempt is void, and the obligation of the contract is not impaired. It would, therefore, be absurd to punish a

State for the vain, ineffectual attempt to impair the obligation of a contract, a thing it could not do, and therefore had not done. So, if by the first section of the fourteenth amendment no State could make or enforce any law to deny the right of suffrage to any portion of its male citizens over twenty-one years of age not guilty of crime, then an attempt to do so would be merely void, wholly inoperative, and it would be absurd to punish such State for doing what it could not do, and, therefore, had not done.

The remedy under the Constitution against any attempted, but unconstitutional legislation of a State is by application to the judicial courts of the Union, which have jurisdiction in all causes arising under the Constitution and laws of the United States, and a supervisory control by writ of error over State courts in regard to causes in which either party asserts a right or privilege under the Constitution or laws of the Union which is denied or overruled by the State court.

The positions maintained, first, that no State can deny to a citizen the right to vote; and, second, that in case the State shall do what it cannot do, certain consequences shall follow, would degrade the fourteenth amendment to the level of compounding, or granting indulgence for, the commission of unconstitutional acts. It would make the amendment say, first, no State shall do a certain thing; but, second, if a State shall do what it cannot do, it shall forfeit certain rights. It is hardly to be supposed that the fourteenth amendment intended to say that a State was forbidden by the Constitution to do a certain thing, but might do so by submitting to a reduction of its basis of representation in Congress.

But there is another reason, equally conclusive, against the construction contended for. By the fourteenth amendment Congress is empowered to enforce all the provisions of that amendment, by appropriate legislation. Therefore, if a State should attempt to exclude from the right of suffrage any persons entitled under the fourteenth amendment to participate therein, it would be the undoubted duty of Congress to defeat such attempt by appropriate legislation. So that to regard the second section of this amendment as imposing upon the State a penalty for denying this right, includes the absurdity of imposing such penalty for an attempt of the State to do what it is the duty of Congress to prevent.

Again, the right of female suffrage is inferentially denied by the second section of the fourteenth amendment, which provides that in case a State, in the exercise of a right conceded to exist, shall exclude a portion of the male inhabitants specified, "the basis of representation therein shall be reduced in the proportion which the number of such (excluded) *male* citizens shall bear to the whole number of *male* citizens twenty-one years of age in such State." The basis is not to be reduced in the proportion which the number of the excluded male citizens shall bear to the whole population of the State, male or female, but only in the proportion which they bear to the number of *male* citizens twenty-one years of age in such State. It is evident, from this provision, that females are not regarded as belonging to the voting population of a State.

The fifteenth amendment is equally decisive. It provides:

> The right of citizens of the United States to vote shall not be abridged or denied by the United States or by any State on account of race, color, or previous condition of servitude.

This amendment would have been wholly unnecessary if the fourteenth amendment had secured to all citizens the right to vote. It must be regarded as recognizing the right of every State, under the

Constitution as it previously stood, to deny or abridge the right of a citizen to vote on any account, in the pleasure of such State; and by the fifteenth amendment the right of States in this respect is only so far restricted that no State can base such exclusion upon "race, color, or previous condition of servitude." With this single exception—race, color, and previous condition of servitude—the power of a State to make such exclusion is left untouched, and, indeed, is actually recognized by the fifteenth amendment as existing.

Your committee have confined themselves to the precise question involved in the memorial, namely, the present constitutional right of female citizens to vote, as to which your committee are unanimous, and have not considered the broader question, whether the constitution ought to be so amended as to permit female suffrage, a report upon which might develop a difference of opinion among the members of your committee.